SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 305

In the Matter of
SLEEP PRODUCTS, INC.,
Bankrupt.

LOCAL 140 SECURITY FUND,
Petitioner,
against
WILLIAM S. HACK, Trustee,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Are employer contributions to union welfare and pension funds, pursuant to a collective bargaining agreement between the now bankrupt employer and a labor union, entitled to priority in payment, under Section 64a(2) of the Bankruptcy Act, 11 U. S. C. § 104a(2), as "wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling city salesmen * * * "?

Summary of the Argument

The decision of the court below does not conflict with the decisions of other courts of appeals.

The decision of the court below does not conflict with the decisions of this Court.

The decision of the court below does not involve an important question of federal law that has not been, and should be, settled by this Court.

POINT I

Jurisdiction on a petition for writ of certiorari is discretionary and should be exercised sparingly and with great caution.

Application has been made to this Court by Local 149 Security Fund for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The jurisdiction of this Court is invoked by the petitioner under 28 U. S. C. § 1254(1), which provides that cases in the courts of appeals may be reviewed by this Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. The judgment of the Court of Appeals was entered on March 4, 1957.

Review of judgments, decrees and orders of the United States courts of appeals in proceedings under the Bankruptcy Act by this Court by writ of certiorari, is authorized by Section 24c of the Bankruptcy Act, 11 U. S. C. § 47c.

The power of determining *what* cases shall be brought up by writ of certiorari is vested solely in the Supreme Court of the United States. *Warner* v. *New Orleans*, 167 U. S. 467, 474 (1897).

The Court, on numerous occasions, has discussed the nature of this jurisdiction that is invoked herein. Thus, in *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916), this Court said:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Lau Ow Bew, Petitioner,* 141 U. S. 583, 587; *In re Woods*, 143 U. S. 202; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *Amer. Const. Co.* v. *Jacksonville Ry.*, 148 U. S. 372, 383; *Forsyth* v. *Hammond*, 166 U. S. 506, 514; *Fields* v. *United States*, 205 U. S. 292, 296."

In *Lau Ow Bew, Petitioner*, 141 U. S. 583, 589 (1891), the Court emphasized that jurisdiction on certiorari "should be exercised sparingly and with great caution."

In fact, this Court has set down some of the criteria that it will consider in granting or disallowing a writ of certiorari. In Rule 19(1) of the Revised Rules of the Supreme Court of the United States, entitled "Considerations governing review on certiorari", it is said that review by writ of certiorari "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Rule 19(1) continues:

> "The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) * * *
>
> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals in the same matter; * * * or has decided

> an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The primary reasons for the granting of certiorari, as indicated by the decisions of this Court, are conflict of decision between the various courts of appeal, need to settle an important question of federal law and conflict between the decision of the court below and the decisions of this Court.

In *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 73, 74 (1955), the Court had occasion to discuss Rule 19:

> "This Rule, formulated thirty years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. * * *
>
> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup.

> Ct. V, VI; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. * * *"

The opinion of the Court in *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163 (1923) contains the following explanation by Mr. Chief Justice Taft on the nature of review by this Court by writ of certiorari:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. * * *"

This Court commonly has consented to act as arbiter between the various courts of appeals and to resolve any conflict of decision between the circuits. At the most recent term of this Court, certiorari was granted in numerous instances to resolve such conflict. See, *inter alia*, *Rex Trailer Co. Inc.* v. *United States*, 350 U. S. 148, 149 (1956); *National Labor Relations Board* v. *Babcock and Wilcox Company*, 351 U. S. 105, 109 (1956); *United States* v. *Zucca*, 351 U. S. 91, 92 (1956); *Millinery Center Building Corp.* v. *Commissioner of Internal Revenue*, 350 U. S. 456 (1956); *Affronti* v. *United States*, 350 U. S. 79 (1956).

In addition to apparent conflict in decision between the various courts of appeals, as a basis for the granting of

certiorari, the question presented usually is one of importance. Thus, in *Mitchell* v. *Budd*, 350 U. S. 473, rehearing denied 351 U. S. 934 (1956), certiorari was sought to review judgments entered in actions brought to enjoin violation of minimum wage and record-keeping provisions of the Fair Labor Standards Act, Sections 6 and 11, 29 U. S. C. §§ 206, 211, by employers who claimed their employees were exempt from coverage under the Act. Certiorari was granted because of the importance of the problems presented and the apparent conflicts between the decision of the court below and those of the Supreme Court and of the Court of Appeals in another circuit.

Unusual or special circumstances must be present for the granting of a writ of certiorari. Although there was no conflict of decision in the circuits in *Muncie Gear Works, Inc.* v. *Outboard, Marine & Manufacturing Co.*, 315 U. S. 759, 765, 766 (1942), the Court granted certiorari "in view of the questions presented and because the patent dominates a substantial portion of an industry so concentrated in the Seventh Circuit that litigation in other circuits, resulting in a conflict of decision is unlikely."

In *Federal Communications Commission* v. *RCA Communications Inc.*, 346 U. S. 86, 89 (1953), the Court granted certiorari "because this case, the first in which the grant of duplicate radiotelegraph circuits has been challenged in the courts, presents an issue of primary importance in authorization, under the Federal Communications Act of 1934, of international radiotelegraph circuits." See also *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 702 (1945).

Indeed, a writ of certiorari issued to settle an alleged conflict in decision between two courts of appeals will be dismissed as improvidently granted, if a later examination of the court discerns that no such conflict existed. See *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 261 U. S. 387 (1923); *Keller* v. *Adams Campbell Co.*, 264

U. S. 314, 319, 320 (1924); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178, 179 (1938); see also *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 78, 79 (1955), and cases cited in footnote 2.

In the case at bar, there is no conflict of decision between the various courts of appeals on the question presented. There is no conflict between the decision of the court below and the decisions of this Court. Nor is there presented an important question of federal law which has not been, but should be, settled by this Court.

POINT II

The decision of the court below does not conflict with the decisions of the various other courts of appeals.

The question presented by the instant application for a writ of certiorari, basically, is a very simple one—are employer contributions to union pension and welfare funds, pursuant to a collective bargaining agreement between the now bankrupt employer and the union, entitled to priority in payment, under Section 64a(2) of the Bankruptcy Act, 11 U. S. C. § 104a(2)?

This section confers priority in payment upon debts for "* * * wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen. * * *"

The question is one of relatively recent import upon the administration of bankrupt estates. There are, in fact, only five district court decisions on this question throughout the country, including the case at bar, and but one court of appeals decision, which comes in the case at bar.

In the case at bar, *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375 (2d Cir. 1957), the United States Court of Appeals for the Second Circuit ruled that such employer contributions are not "wages". In so doing, the court affirmed the order of the United States District Court for the Southern District of New York in disallowing the claim filed by Local 140 Security Fund as a priority claim. The District Court decision is reported at 141 F. Supp. 463.

The first district court ruling on this question was in *Matter of Brassel*, 135 F. Supp. 827 (D. C. N. D. N. Y. 1955). There, the court held that employer contributions based on five (5%) percent of the gross monthly payroll due to a union welfare fund were not "wages" entitled to a priority under Section 64a(2) of the Bankruptcy Act. The decision in *Matter of Brassel, supra*, was followed in the case at bar.

Three subsequent decisions have been announced. In *Matter of Otto*, 146 F. Supp. 786 (D. C. S. D. Calif. C. D. 1956) the district court allowed the claims as priority claims under Section 64a(2) of the Bankruptcy Act. In *Matter of Victory Apparel Mfg. Corp.*, — F. Supp. — (D. C. N. J. 1957), decided on July 17, 1957, not yet officially reported, the New Jersey District Court followed the decision of the court below in the case at bar, in denying priority to the claims. The court also distinguished a recent decision in *In re Embassy Restaurant, Inc.*, — F. Supp. — (D. C. E. D. Pa. 1957), not yet officially reported, decided on June 28, 1957. (The decision of the New Jersey District Court is set forth in full as Appendix "A" hereinafter.) The Pennsylvania District Court, as set forth in *Matter of Victory Apparel Mfg. Corp., supra*, chose to follow the California District Court decision in *Matter of Otto, supra.*

Prior to the decision in *Matter of Brassel, supra*, there were several decisions by Referees in Bankruptcy, as out-

lined in the petition for a writ herein, at page 7, all of which apparently upheld the proposition that such employer contributions were entitled to priority in payment.

However, none of these decisions were reviewed. In *Matter of Brassel, supra*, in the case at bar and in *Matter of Victory Apparel Mfg. Corp., supra*, each Referee in Bankruptcy ruled that the claims are not entitled to a wage priority. Indeed, Referee Loewenthal in the case at bar expressly declined to follow the earlier decision of Referee Joyce in *Matter of 534 Catering Corp.* (D. C. S. D. N. Y. No. 84856, 1949), not officially reported.

The fact remains that since these claims have come under closer scrutiny within the framework of the Bankruptcy Act, there has been a clearly demonstrable effort by the courts to restrict the priorities under Section 64 of the Bankruptcy Act to those obviously contemplated by the Congress.

Matter of Otto, 146 F. Supp. 786 (D. C. S. D. Calif. C. D. 1956) can be limited to its facts and the particular collective bargaining agreement at question in that case, since the payments to the fund were expressly related to the hourly wages of each employee. Indeed, the court said, 146 F. Supp. at page 788:

> "Employer contributions to this Welfare Fund come from setting aside for such purpose specified portions (originally five cents and later six cents per hour) of cost-of-living wage increases obtained after collective bargaining following annual wage reopenings."

In addition, the California District Court, in part, rested its decision upon the theory that the employees assigned a portion of their "wages" to the welfare fund, and that such was permitted by statute in California (146 F. Supp. at p. 790).

The foregoing decisions, it is respectfully submitted, do not evidence any conflict of authority between courts of appeals. The divergence of opinion in the district courts is not over any conflict as to federal law, but rather arises from the effect of different state laws upon the resolution of this question.

It is respectfully submitted that the requisite element of conflict needed for the granting of a writ of certiorari is not present.

POINT III

The decision of the court below does not conflict with the deci ions of this Court.

There are no decisions by this Court on the question presented on this application for a writ of certiorari. Surely, then, the decision of the court below would not seem to conflict with the decisions of this Court.

However, petitioner attempts to create such a conflict by bringing the instant proceeding within the scope of this Court's decision in *United States* v. *Carter*, 353 U. S. —, 77 S. Ct. 793 (1957), No. 48 October Term, 1956, decided April 29, 1957.

Examination of the decision in the *Carter* case discloses, at best, a surface similarity. The *Carter* case involved the question of the liability of a surety on a payment bond furnished by a contractor, as required under Section 1 of the Miller Act of 1935, 40 U. S. C. § 270a(1)(2), "for the protection of all persons supplying labor and material" in the construction of federal public buildings. In the *Carter* case, when the contractor failed to pay in full the contributions to the health and welfare fund, as required by the collective bargaining agreement, the trustees of the fund sued the surety on the contractor's payment bond to recover

the balance due to the fund, plus liquidated damages, attorneys' fees, court costs and expenses. Section 2 of Miller Act, 40 U. S. C. § 270b.

In the *Carter* case, the Supreme Court ruled that the payments in question fell within "the broad but not unlimited protection" of the Miller Act (353 U. S. at —, 77 S. Ct. at 797) and that the trustees of the welfare fund "stand in the shoes of the employees and are entitled to enforce their rights" (353 U. S. at —, 77 S. Ct. at 798).

However, only by dint of much struggling and tugging at the bootstraps can the case at bar be fitted within the framework of the decision in *United States* v. *Carter*, *supra*. Aside from the fact that a different statute is being construed, it should be noted that this Court very carefully pointed out that the Miller Act does not limit recovery on the statutory bond to "wages", which is the question in the case at bar (353 U. S. at —, 77 S. Ct. at 797). The court merely found that for the purposes of the Miller Act, these contributions are as much "justly due" to the employees who have earned them as are the wages payable directly to them in cash (353 U. S. at —, 77 S. Ct. at 798, 799).

That the welfare fund was a proper claimant in the *Carter* case does not enhance its position in the case at bar since the circumstances are entirely different. In the *Carter* case, the right of the fund to sue on the performance bond was questioned. In the case at bar no one questions the *right* of the fund to file a claim for unpaid contributions. What is disputed is the contention of the fund that, essentially, it is entitled to "stand in the shoes of the employees and * * * enforce their rights" since, by the collective bargaining agreement itself, the employees have no enforceable rights (App. 13a).

Petitioner claims in its petition for the writ (p. 10) that it appears from the opinion of the court in *United*

States v. *Carter, supra,* that the collective bargaining agreement and the welfare fund involved in that case were identical with those in the case at bar, with two exceptions: (1) in *Carter,* employer contributions are based upon the number of hours worked, and (2) the contract in the *Carter* case specifically stated that employer contributions were not to be considered as "wages".

However, it would appear that the collective bargaining agreement and welfare fund involved in *United States* v. *Carter, supra,* were not identical with those in the case at bar, but rather are identical with those in *Matter of Otto,* 146 F. Supp. 786 (D. C. S. D. Calif. C. D. 1956), wherein was produced one of the district court decisions on this question allowing priority to the claims. Both cases arise in the same state—California—and apparently are the only reported cases involving collective bargaining agreements and welfare funds of this type.

Thus, it is submitted that the decision of this Court in *United States* v. *Carter,* 353 U. S. —, 77 S. Ct. 793 (1957), not only is not decisive of the question presented in the case at bar, but actually has little or no bearing thereon.

In *Nathanson* v. *National Labor Relations Board,* 344 U. S. 25, 28, 29 (1952), this Court determined that a back-pay award by the National Labor Relations Board, while not entitled to payment in full, as contended, as a debt owed to the United States (Section 64a(5) of Bankruptcy Act, 11 U. S. C. § 104a(5)), rather could be proved as a wage claim within the limits prescribed by Section 64a(2) of the Bankruptcy Act. The Court stated, 344 U. S. at pages 28, 29:

> "The Board argues that the interest of the United States in eradicating unfair labor practices is so great that the back pay order should be given the additional sanction of priority in payment. Whether

> that should be done is a legislative decision. The contest now is no longer between employees and management but between various classes of creditors. The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act. * * * The theme of the Bankruptcy Act is 'equality of distribution' (*Sampsell v. Imperial Paper Corp.*, 313 U. S. 215, 219); and if one claimant is to be preferred over others, the purpose should be clear from the statute * * *."

In the case at bar, the question presented must be answered by reference to the Bankruptcy Act and not by resort to other federal statutes, such as the National Labor Relations Act and the Miller Act.

By virtue of the foregoing it is submitted that the decision in the court below does not create any conflict with the decisions of this Court.

POINT IV

The question of federal law presented herein is not one that need be settled by this Court.

The question presented by the petitioner is one that is most important and of special significance to the petitioner. Whether it is an "important question of federal law which has not been, but should be, settled by this court" is something else.

What is presented to the Court by the petition herein is a claim that flies in the face of the clear and unequivocal words of Section 64a(2) of the Bankruptcy Act.

The Congress under this section has accorded priority in payment to "* * * *wages and commissions*, not to ex-

ceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, *due to* workmen, servants, clerks, or traveling or city salesmen on salary or commission basis * * *."

The unpaid employer contributions herein, by their own terms, are not "wages" nor are they due to "workmen, servants, clerks, or traveling or city salesmen." That the contributions may be socially desirable and economically wise no one will dispute. But the wisdom and desirability of these payments cannot place them in a preferred status that Congress has not given them.

To repeat the words of this Court, in *Nathanson v. National Labor Relations Board*, 344 U. S. 25, 29 (1952): "The theme of the Bankruptcy Act is 'equality of distribution' (citation omitted); and if one claimant is to be preferred over others, the purpose should be clear from the statute."

It is submitted that the purpose to give to the claimant a preferred status with respect to the claim at issue herein does not rise clearly from the Bankruptcy Act. Indeed, it clearly appears that unpaid employer contributions are *not* within the area of claims favored by Section 64a(2).

In view of the clear and precise language of Section 64a(2), it cannot be said that the question presented is "an important question of federal law which * * * should be settled by this court". The very language of the statute that is relied upon by the petitioner indicates there is no question to be settled by this Court. The question has been settled by the Congress.

Further, it is not readily apparent that there is any substantial dispute that can be settled by this Court. The discussion herein on a previous point indicates that the reported decisions are not unanimous in holding that a claim such as the one presented in the case at bar is not entitled to priority under Section 64a(2) of the Bankruptcy Act.

The only divergence in opinion, aside from unreported decisions of Referees in Bankruptcy, is found in *Matter of Otto*, 146 F. Supp. 786 (D. C. S. D. Calif. C. D. 1956)—and the decision in the *Otto* case can be explained by different fact situation involved—and in *In re Embassy Restaurant, Inc.*, — F. Supp. — (D. C. E. D. Pa. 1957), not yet officially reported, which expressly followed the *Otto* case.

It is questionable whether the problem sought to be placed at issue in the case at bar can be resolved by this Court, so as to provide uniformity of decision, since widely diverse state laws have, and will, influence the decisions on this question. (Cf. *Matter of Otto*, 146 F. Supp. 786; 790 [D. C. S. D. Calif. C. D. 1956].) Decisions also will be influenced by the wording of the various collective bargaining agreements and declarations of trust, which vary from draftsman to draftsman. The ultimate resolution of the question presented in the case at bar, if such welfare and pension-fund payments are to be accorded priority under Section 64a(2) of the Bankruptcy Act, is in the hands of the Congress.

Indeed, both the District Court (141 F. Supp. at page 470) and the United States Court of Appeals for the Second Circuit (242 F. 2d at page 378) below stated that the expansion of Section 64a(2) of the Bankruptcy Act, sought in the case at bar, should be accomplished by Congressional amendment rather than judicial amendment. The claimant has not asserted its claim in the proper forum.

Judge Herlands, in his carefully reasoned opinion in the District Court below, stated (141 F. Supp. at page 470; App. 72a, 73a):

> "If the definition of wage claims within section 64, sub. a(2) is to be expanded, that result should be achieved by the method of Congressional amendment. That technique of law revision would afford the opportunity for full debate by labor unions, credit associations, bankruptcy law experts and others. It

would permit Congress to adjust, deliberately, competing economic interests and conflicting social and public policies. It would avoid uncertainty in a relatively new and expanding field of management labor relations, where there is no standardization in the form and character of union welfare funds and where there is an absence of state regulation. It would enable Congress to explore the impact of the suggested new definition upon the administration of such other statutes as the Taft-Hartley Act."

Placed in its proper context, the question presented in the case at bar does not involve an important question affecting the administration of the Bankruptcy Act. The Bankruptcy Act is clear and precise in answering this question and disallowing priority under Section 64a(2). That section of the statute does not permit the interpretation claimed by petitioner.

CONCLUSION

It is respectfully submitted that the petitioner has shown no reason for the granting of the petition for a writ of certiorari, and the petition should be denied.

Respectfully submitted,

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APPENDIX A

(Opinion of United States District Court, District of New Jersey)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Bankruptcy No. 506-55

—o—

In the Matter of

VICTORY APPAREL MANUFACTURING CORPORATION,
Bankrupt.

—o—

Appearances:

RAFF, SHERMAN & SCHEIDER, Esqs., Attorneys for Trustee, By: LOUIS SHERMAN, Esq.

CHESTER A. WEIDENBURNER, Esq., United States Attorney, Attorney for United States of America, By: JEROME D. SCHWEITZER, Esq., Assistant United States Attorney.

SIDNEY REITMAN, Esq., Attorney for Claimant; JACOB SHEINKMAN, Esq., and HENRY MITTLER, Esq. (New York Bar), of Counsel.

MODARELLI, *District Judge.*

There is a petition before the court to review an order of the Referee in Bankruptcy regarding the disallowance of certain claimed wage priorities. On May 1, 1957, Referee William H. Tallyn granted a motion of the Trustee to expunge and disallow the claim of Local 126 of the Amalgamated Clothing Workers of America for contributions to the Amalgamated Cotton Garment and Allied Industries Insurance and Retirement Funds as a priority claim for wages within the meaning of § 64(a)(2) of the Bankruptcy Act, 11 U. S. C. A. § 104(a)(2). The Trustee and the United States of America, the latter as a creditor of the bankrupt, appeared in support of the Referee's order.

Upon the filing of a petition in bankruptcy by the Victory Apparel Corporation, the appellant-claimant, Local 126 of the Amalgamated Clothing Workers of America, hereinafter referred to as "Local 126," filed a proof of claim amended to the amount of $1,695.84. This sum represents alleged wage priorities due for a 90-day period prior to the filing of the petition. The claim is predicated upon a collective bargaining agreement dated January 3, 1955, signed by the employer-bankrupt and Local 126. Pursuant to this agreement, the employer was required to make payments computed at four and one-half per cent of the gross reportable payroll of the employees in the bargaining unit. These payments were made directly to the Insurance and Welfare Funds. For the three-month period immediately preceding the filing of the bankruptcy petition, the employer failed to pay $1,695.84 to the funds; this is the amount of the claim, as noted above. The fundamental question disposed of by the Referee and now before this court is whether employer contributions to union health and welfare funds, made pursuant to a collective bargaining agreement, are entitled to priority in payment as "wages" pursuant to § 64(a)(2) of the Bankruptcy Act.

Perhaps it would be instructive to recite the statutory language which comprises the prerequisites to a valid priority.

> "a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time,

> whether or not selling exclusively for the bankrupt; * * *." Section 64(a)(2), 11 U. S. C. A. § 104(a)(2).

As noted by the recognized authority in the field of bankruptcy, "wages" for which a prior claim may be made under the statute "are closely circumscribed by express provisions of the Act," and each one of the statutory "qualifications must be satisfied before priority entails." *Collier on Bankruptcy*. (14th ed. 1941), p. 2083.

To determine whether the claim in this case satisfies the statutory definition, it is necessary to analyze the agreement negotiated by the employer and Local 126. The collective bargaining agreements, with supplements, were introduced in evidence at the hearing before the Referee and are before this court.[1] These agreements contain the usual provisions in relation to the hiring of employees, hours of employment, rates of compensation, days to be defined as legal holidays, and vacation pay. Article IX makes reference to and incorporates the supplemental agreements dealing with the insurance and retirement funds. Paragraph Three of the supplement agreement relating to the Cotton Garment Retirement Fund reads as follows:

> "3. Commencing on the pay day for the week of January 3, 1955, and weekly thereafter, the Employer shall pay to the Trustees (hereinafter called the 'Trustees') designated under an Agreement and Declaration of Trust dated as of May 1, 1950 and as amended as of March 27, 1953, a copy of which Agreement and Declaration of Trust has been exhibited to and approved by the Employer and is herein specifically incorporated by reference, sums of money determined as follows:
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> "Two (2%) per cent of the wages payable for the preceding pay period to all the Employees."

[1] Union Exhibits 6, 7, 8, and 9.

The supplemental agreement designated Cotton Garment Insurance Fund contains the same language except that the contribution is calculated as follows:

> "Two (2%) of the wages payable for the preceding pay period to all Employees, and commencing on the pay day for the week of January 1, 1954, and weekly thereafter, the aforesaid percentage of payroll shall be increased to three (3%) per cent."

Paragraph Five of the agreements contains the following language:

> "5. No Employee or member of his family shall have the option to receive instead of the benefits provided for by the Agreement and Declaration of Trust any part of the contribution of the Employer. No Employee or member of his family shall have the right to assign any benefits to which he may be or become entitled under the Agreement and Declaration of Trust or to receive a cash consideration in lieu of such benefits, either upon termination of the trust therein created or through severance of employment or otherwise."

The Referee, in expunging the claim as a priority claim, based his decision on Judge Leibell's ruling in a similar case, *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375 (C. A. 2 1957) affirming in the *Matter of Sleep Products, Inc.*, Bankrupt, 141 F. Supp. 463 (D. C. S. D. N. Y. 1956). There the Court of Appeals ruled that the payments created only a debtor-creditor obligation for something other than wages. The court concluded as follows:

> "The language of the statute granting priority to wages cannot be stretched so as to embrace this type of claim. If every type of payment made by an employer to a union welfare fund is to be given

> priority as a claim for 'wages' under Section 64, sub. a(2) of the Bankruptcy Act, that should be done through the legislative action of the Congress, and not by any judicial mislabeling of such payments as 'wages.'" 242 F. 2d at p. 378.

In a concurring opinion, Judge Hincks added that a welfare fund cannot, by any construction, be embraced in the term "workman" to whom wages are due.

The question here discussed has not been decided by our Court of Appeals. On the basis of an independent analysis of the evidence against the background of several years of judicial experience in applying the Bankruptcy Act to specific fact situations, I am impelled to subscribe to the conclusion reached in the Second Circuit Court of Appeals. To summarize my conclusion, the nature of the benefits which accrued to the employees from the funds discloses that the employer's contributions do not constitute "wages" that are "earned" by and "due to" the employees. The employer's contribution is due to independent entities, the Trustees of the respective funds; the obligation of such payment is not a debt owed the individual employee. Indeed, the employee could not sue for any arrearages. The contracts themselves contain explicit language which authorize and empower the Trustees of each fund to take whatever steps may be necessary in any proceeding at law, in equity, or in bankruptcy to effectuate the collection of any sums due.[2] This evidence corroborates the finding that the employee has no proprietary interest in the funds.[3] Furthermore, inasmuch as Local 126 rather

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[2] Union Exhibits, Paragraph 6(C) of 8 and 9.

[3] Cf., *United Marine Division, I.L.A., Local 333, A. F. of L.* v. *Essex Transportation Co.*, 216 F. 2d 410, 412 (C. A. 3 1954); a case dealing with employer payments to a pension trust for employees. In that instance it was held that the trustees were not representatives of the employees or of the employers.

belatedly rested its claim upon the ground, among others, of an assignment, I hasten to add that it must follow from what has just been said that the employee has no assignable interest, equitable or legal, in the funds. The right to assign presupposes some property interest in a res or chose in action.

The conclusions reached become all the more convincing to me when the legislative purpose of the statutory provision is reviewed. The legislative intent underlying the priority to the specified wage claims is to furnish distressed workers with a cushion of purchasing power against the impact of their employers' bankruptcy. *Collier on Bankruptcy*, (14th ed. 1941), Vol. 3, Paragraph 64.201; see also *Blessing* v. *Blanchard*, 223 F. 35 (C. A. 9 1915). This rationale does not encompass an employer's unpaid contributions to a union insurance or retirement fund.

The contentions arising from the record of this case illustrate the mischief caused when we lift a term from its context and seek to have it do service in an alien setting. Conceded, the term "wages" has been expanded to comprise severance pay, vacation pay, back pay wards under the N. L. R. A., and portal-to-portal pay. *In re Wil-low Cafeterias, Inc.*, 111 F. 2d 429 (C. A. 2 1940); *In re Public Ledger*, 161 F. 2d 762 (C. A. 3 1947); *Kavanas* v. *Mead*, 171 F. 2d 195 (C. A. 4 1948); and other decisions. But in all of these cases, the wages were due the worker directly for services rendered and were not due to another pursuant to a contract. The brief submitted by the claimant cites numerous decisions which interpret the term in the light of the particular statute then before the courts. For example, the Court of Appeals in *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C. A. 7 1948), cert. denied 336 U. S. 960, examined the term "wages" in the light of Section 9(a) of the National Labor Relations Act. We may accept that court's view that so-called "fringe benefits" are subjects over which employers are

compelled to bargain collectively. The point to be noted here, however, is that the term "wages" will take its content and meaning from the particular legislative enactment. The problem, in short, calls for the application of the maxim "noscitur a sociis," which is to say that words like people, may be known by the company they keep. The general and specific words are associated with and take color from each other.

The Bankruptcy Act evinces a carefully drawn and delicately balanced pattern of priorities. As our Court of Appeals has declared in *In re Ko-ed Tavern, Inc.*, 129 F. 2d 806, 809 (C. A. 3 1942):

> "By § 64 sub. a, of the Bankruptcy Act, wage claimants are entitled to priority of payment immediately after administration expenses if, but only if, they supply the qualifications called for by the Act. If they fail to do so their claims are automatically relegated to the class of general unsecured creditors. See 3 Collier on Bankruptcy, 14th Ed., p. 2083."

Subsequent to the hearing, claimants directed my attention to the decision in the *Matter of Embassy Restaurant, Inc.*, rendered June 28, 1957, by Judge Welsh of the United States District Court for the Eastern District of Pennsylvania. As the court there noted, our Court of Appeals has not resolved the matter, and cases in other circuits are not in harmony. That being so, Judge Welsh concluded that the case of *In re Otto*, 146 F. Supp. 786 (D. C. S. D. Calif. 1956) was "most persuasive." That decision of Judge Mathes rests its holding upon the theory that the employees assigned a portion of their "wages" to the welfare fund. The court emphasized that it had to look "to the state law which rules the validity and effectiveness of any partial assignment," and concluded that partial assignment was expressly sanctioned by California statute. Cal. Civ. Code, §§ 1044, 1045. 146 F. Supp.

at 790. By contrast, the law of New Jersey is contra, *i.e.*, the courts do not enforce such assignments. *Glaser* v. *Columbia Laboratories, Inc.*, 11 N. J. Misc. 707, 167 Atl. 201 (S. Ct. 1933), affirmed 112 N. J. L. 91, 169 Atl. 693 (E. & A. 1934). The more persuasive reasoning it seems to me is that of Chief Judge Brennan in *In the Matter of Brassel*, 135 F. Supp. 827, 839 (D. C. N. D. N. Y. 1955), and of the courts in *Local 140 Security Fund* v. *Hack*, supra. As these courts have noted, it is for Congress to expand the carefully framed priority coverage of the Bankruptcy Act; it is not a proper matter for judicial legislation.

The order of the Referee is affirmed.

The foregoing opinion shall constitute findings of fact and conclusions of law, as required by Rule 52.

An order may submitted in conformity with the opinion herein expressed.